In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-405

LEE W. MERRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1972, and a petition for rehearing was denied on August 25, 1972. The petition for a writ of certiorari was filed on September 9, 1972. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's rights under the speedy trial provision of the Sixth Amendment or the due process clause of the Fifth Amendment were violated on the facts of this case.

2. Whether petitioner was properly advised of his Fifth Amendment rights by an investigating special agent of the Internal Revenue Service.

3. Whether it was error to instruct the jury that if it found beyond a reasonable doubt that petitioner had signed his tax return it could infer that he knew of the contents of the return.

4. Whether it was error to refuse to instruct the jury that the government's evidence must be inconsistent with any reasonable hypothesis of innocence.

5. Whether it was error to refuse to instruct the jury that, even if petitioner were acquitted, the government would still be able to collect the unpaid taxes, interest and penalties by instituting a civil action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States and of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, are set forth at Pet. 4.

STATEMENT OF THE CASE

Petitioner, after a jury trial in the United States District Court for the District of Colorado, was convicted of willfully attempting to evade personal income taxes for 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. He was sentenced to concurrent terms of imprisonment for one year on the 1963 count and for eighteen months on the 1964 count (VIII-R. 267).[1]

Petitioner operated plants in Colorado and Kentucky which purchased, processed, and sold products derived from animal carcasses (IV-R. 373, 387, 405). Most of these products were sold to manufacturers of pet food who paid by check (III-R. 183; IV-R. 369, 374, 378). Such checks were deposited to business bank accounts and were properly reflected in petitioner's records and reported on his tax returns (II-R. 84, 93; III-R. 184, 189).

The evidence also established, however, that some of petitioner's products were sold from the Colorado plant to an Indiana sausage manufacturer, Laurents Packing Company (IV-R. 367, 369, 373, 375, 395). Petitioner personally arranged with Laurents for each such sale (III-R. 218-220, 242-243, 256-257; IV-R. 307-310). Petitioner insisted that Laurents pay him in cash, which Laurents agreed to do even

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[1] References to I-R through XI-R are to the eleven volumes of the original record on appeal; references to I-Supp. R. through III-Supp. R. are to the supplemental record on appeal; references to I-2d Supp. R. through IV-2d Supp. R. are to the second supplemental record on appeal.

though that method of payment was contrary to its normal business procedures (III-R. 227, 266; IV-R. 310, 325, 331, 336). The payments were made to petitioner, or at times to his son or son-in-law, with cash obtained by Laurents' employees by cashing checks made payable to cash or to fictitious persons (III-R. 222, 228-231, 260-266; XI-R. 872-873). None of the proceeds of the sales to Laurents were deposited to petitioner's business bank accounts, reflected in petitioner's records, or reported on his tax returns (II-R. 87, 93, 105; IX-R. 284, 298, 352-367, 460-463; XI-R. 874-884). The omission of these items from petitioner's tax returns resulted in underpayments in income tax in the amounts of $9,135 and $48,541 for the years 1963 and 1964, respectively (VI-R. 557-559).

Petitioner's accountant in Colorado prepared state income tax returns from monthly summaries of sales; he discussed these returns with petitioner but was not informed of the sales to Laurents (II-R. 80, 85-87). The Colorado accountant mailed copies of the state tax returns to petitioner's Kentucky accountant, who prepared petitioner's federal income tax returns (II-R. 87). The Kentucky accountant was not advised by petitioner of the sales to Laurents either (II-R. 127, 134).

The tax investigation began in 1964, when petitioner's 1962 return was assigned to a revenue agent for examination. This agent interviewed petitioner and the case was thereafter assigned to a special agent of the Intelligence Division who interviewed

petitioner in February 1965 and warned him that it was his right not to incriminate himself, that his statements might be used against him in criminal or other proceedings, and that he was entitled to be accompanied by his attorney (VIII-R. 159-160). The special agent's investigation was discontinued in March 1966 but was reopened in February 1967 (VIII-R. 11). A criminal complaint was filed by the government on April 11, 1969 and an indictment was returned on December 4, 1969 (VIII-R. 31; IV-2d Supp. R. 1-5). This indictment was dismissed on June 9, 1970, on motion of the government because of a breach of grand jury secrecy; a second indictment was returned on October 6, 1970 (Pet. App. 3-4). After fourteen motions had been filed by petitioner, including a motion to dismiss the indictment for delay in prosecution, the case was tried in March 1971. No motion demanding a speedy trial was filed by petitioner (Pet. App. 2).

Prior to the trial, two prospective government witnesses died. One was petitioner's bookkeeper, Mrs. Woertendyke, whose affidavit had been furnished to petitioner's counsel. The second was a truck driver who died in 1964 before petitioner was even interviewed by the special agent (VI-R. 588). The general business records of the Laurents Packing Company were destroyed in 1968, but the records relating to Laurents' purchases from petitioner had previously been secured by the government in the course of its investigation (VIII-R. 145-147). The pretrial statements given by Laurents' employees to the revenue agents during their investigation, and the

agents' reports of their investigation, were furnished to petitioner's counsel at trial (Pet. App. 5).

The court of appeals affirmed petitioner's convictions in a comprehensive opinion addressed to all the issues petitioner seeks to raise in this Court.

ARGUMENT

1. Petitioner's contention (Pet. 19-24) that the pretrial delay violated his rights to due process and a speedy trial is fully answered in the opinion of the court of appeals (Pet. App. 2-5), on which we rely.

2. Petitioner's contention (Pet. 24-29) that he was not properly advised of his Fifth Amendment rights is soundly rejected in the opinion of the court of appeals (Pet. App. 5-7). We add (1) that petitioner's suggestion that he should have been warned of his rights as to the 1964 offense at his first meeting with the special agent is without merit, for at the time of that meeting petitioner had not yet even filed his 1964 return and in any event petitioner was warned that the evidence he supplied could be used in any criminal proceeding (Pet. 11); (2) that it was unnecessary to advise petitioner of his right to appointed counsel, since he indicated that he already had a lawyer (*ibid.*); (3) that petitioner clearly indicated his willingness to respond to questioning (Pet. 12); (4) that it was unnecessary to advise petitioner of any rights in connection with a summons issued to his accountant (Pet. 13-15), but in any event the prior, repeated warnings read to petitioner (Pet. 11-13) gave him ample notice of his rights with

respect to any evidence he might produce; (5) that the interviews long predated the prospective requirements of *Miranda* v. *Arizona*, 384 U.S. 436; and (6) that this case involves no conflict among the courts of appeals on the Fifth Amendment issues raised by petitioner.

3. There is no foundation for petitioner's contention (Pet. 29-32) that he "was convicted on the basis of a conclusive presumption that one who signs his tax return knows its contents." The district court's instruction, to which petitioner did not object,[2] was as follows (Pet. 29):

> Whenever the fact appears beyond a reasonable doubt from the evidence in the case that the accused signed his Tax Return, the jury may draw the inference and find that the accused had knowledge of the contents of the Return.

The instruction was proper. A signature on a tax return is "*prima facie* evidence that the signor knows the contents thereof." *United States* v. *Bass*, 425 F. 2d 161, 163 (C.A. 7). This *prima facie* evidence warrants a "permissive inference." *Webre Steib Co.* v. *Commissioner*, 324 U.S. 164, 169. The inference permitted by the instruction here was only permissive and not conclusive.

Although petitioner argues (Pet. 30) that the decision below is in conflict with *United States* v. *Bass*, *supra*, the language he quotes from the opinion of

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[2] Petitioner's undocumented statement (Pet. 29) that this instruction was given "over objection" is not correct and is not supported by the record (VII-R. 685).

the Court of Appeals for the Seventh Circuit in that case shows that the court was there concerned with unwarranted creation of a "conclusive presumption" attributing "conclusive knowledge" of the contents of the return. That was not the thrust or impact of the instruction given in this case. In any event, petitioner failed to object to the instruction at trial (VII-R. 685) and is therefore precluded from contesting it on appeal. Rule 30, Fed. R. Crim. P. And any error in the instruction was harmless for there was ample direct evidence of petitioner's intention to avoid disclosure of his transactions with Laurents.

4. Petitioner contends (Pet. 32-33) that the district court erred in refusing to give his tendered instruction (Pet. 18, n. 10) that he should be acquitted unless the circumstantial evidence was "inconsistent with any reasonable hypothesis of innocence." This argument was rejected in *Holland* v. *United States*, 348 U.S. 121, where this Court concluded (at 139-140) that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." The jury here was properly instructed on the standards for reasonable doubt (VII-R. 678-682) and no further instructions were required. Contrary to petitioner's claim, nothing this Court said in *In re Winship*, 397 U.S. 358, holding that proof beyond a reasonable doubt is among the essentials of due process, casts doubt on the continued vitality of *Holland*.

5. The district court correctly refused petitioner's request to instruct the jury that he "will have to

pay all taxes" which he owes "regardless of your verdict" (Pet. 18, n. 12). Even evidence of payment made after commission of the offenses could have been excluded. *Hayes* v. *United States*, 227 F. 2d 540, 543 (C.A. 10). *A fortiori*, it is irrelevant that petitioner might ultimately have to pay his civil tax liabilities. Although, as petitioner notes (Pet. 33-34), a few district courts do inform the jury that determination of civil liabilities may be made in other proceedings, there is no conflict among the courts of appeals on this issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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